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Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** VIP Human Resources

**File:** B-242696

**Date:** May 21, 1991

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W. Keith Davis, Esq., Jennings, Novick, Ensign & Ostling, for the protester.  
Denis J. Conlon, Esq., and William P. Lehman, Esq., Internal Revenue Service, Department of the Treasury, for the agency.  
Barbara C. Coles, Esq., Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency improperly proceeded with bid opening without the applicable wage determinations in the solicitation is timely where the solicitation advised that the wage determinations would be provided when received and the protest is filed within 10 working days of the bid opening date.

2. Protest alleging that the agency's failure to incorporate applicable wage determinations in the solicitation deprived bidders of an opportunity to prepare bids based on the wages required to be paid under the resulting contract is denied where the agency could not delay bid opening to wait for a response from the Department of Labor to the agency's request for the applicable wage rates because of an urgent need to initiate contract performance for temporary services.

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### DECISION

VIP Human Resources protests any award of a contract under invitation for bids (IFB) No. IRS-MW-91-04, issued by the Internal Revenue Service (IRS), Department of the Treasury, for various temporary services during the 1991 tax filing season.

We deny the protest.

On September 20, 1990--more than 2 months before issuing the IFB--IRS requested wage determinations from the Department of Labor (DOL) to establish the minimum wages and fringe benefits a contractor must provide to the various classes of

service employees used in performing the contract. IRS requested the wage determinations by submitting to the DOL standard form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," pursuant to the regulations set forth at 29 C.F.R. § 4.4(a)(1) (1990), which implement the Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1988). Because IRS needed these services as soon as possible after January 1, 1991, it issued the solicitation on November 30, although it had not received the wage determinations from DOL. The solicitation stated that the applicable wage determinations would be provided to offerors upon the agency's receipt of the determinations.

Despite several attempts to contact DOL personnel regarding the requested determinations, the contracting officer did not reach the individual at DOL with responsibility for issuing the determinations until January 4, the bid opening date. In that conversation, the contracting officer was directed to submit to DOL a second SF 98, which she did. However, since IRS was unable to delay the procurement further due to the upcoming tax season, it opened bids as scheduled on January 4 without the wage determinations. IRS received the wage determinations on January 7, and awarded the contract on January 10 to Express Services. On January 15, VIP protested to our Office.

VIP contends that the agency's decision to proceed with bid opening was improper because the absence of wage determinations rendered the IFB defective and deprived bidders of an opportunity to prepare bids based on the wages required to be paid under the resulting contract. VIP also alleges that the agency's failure to include wage determinations in the IFB permitted the awardee to submit an artificially low bid, and that the awardee's employees are not earning the minimum wage set by the applicable wage determinations.

As a preliminary matter, IRS asserts that the protest is untimely because it concerns an alleged solicitation impropriety--the absence of wage determinations--which was apparent prior to bid opening. IRS thus contends that the protest should have been filed before the January 4 bid opening date. See 4 C.F.R. § 21.2(a)(1) (1991). We disagree. Although the solicitation as issued did not contain the applicable wage determinations, section J.1 of the solicitation clearly stated that the "wage rate determination would be attached upon receipt from DOL." In response to section J.1, VIP made repeated inquiries about the availability of the determinations prior to and on the date of bid opening. Since the protest is based on the allegation that bids should not have been opened without the wage determinations, and since the protest was filed on January 15, within 10 working days of bid opening, the protest is timely. See 4 C.F.R.

S 21.2(a)(2); Scientific Radio Sys., Inc., B-228033; B-228033.2, Nov. 13, 1987, 87-2 CPD ¶ 483 (protest of agency failure to provide wage determination is untimely when filed within 10 days after contract award, rather than 10 days after submission of best and final offers).

In response to VIP's argument that IRS should not have opened bids until it received the wage determinations and incorporated them into the IFB, IRS states that the actions of its contracting officer were proper under the circumstances. Specifically, IRS requested the wage determinations from DOL more than 60 days in advance, and issued the solicitation expecting that it would receive the wage determinations in time to incorporate them into the IFB prior to the scheduled bid opening date. When IRS learned on the bid opening date that DOL wanted the agency to resubmit its SF 98 and again request the determinations, the agency concluded that its need to initiate contract performance at the beginning of the tax filing season precluded it from postponing bid opening to wait for the determinations.

The Service Contract Act, 41 U.S.C. §§ 351-358, requires federal contractors to pay minimum wages and fringe benefits as determined by the Secretary of Labor to employees under service contracts exceeding \$2,500. When the Act applies to a particular contract, that contract must contain certain provisions specifying the minimum level of wages to be paid, 41 U.S.C. § 351(a)(1), and the minimum level of fringe benefits to be provided. 41 U.S.C. § 351(a)(2). Regulations implementing the Act require that agencies notify DOL of their intent to enter into such contracts and to list the classes of workers they expect to employ. See 29 C.F.R. part 4.

The applicable regulations require contracting officers to submit an SF 98 to DOL not later than 60 days before issuing an IFB, unless the contracting action is for a nonrecurring or unknown requirement for which advance planning is not feasible, in which case the SF 98 must be submitted to DOL at least 30 days before the IFB is issued. 29 C.F.R. § 4.4(a)(1); Federal Acquisition Regulation (FAR) § 22.1008-7(b). When contracting officers do not receive a response from DOL, they are required to contact the Wage and Hour Division for guidance. 29 C.F.R. § 4.5(d); FAR § 22.1012-2(a). The regulations recognize, however, that despite an agency's compliance with the requirement to contact DOL, there may be exceptional circumstances--regardless of when the contracting officer submitted the SF 98--where, as here, DOL does not respond in time to incorporate the determination in the IFB. See 29 C.F.R. § 4.5(a)(2), (c)(1); FAR §§ 22.1012-2(b) and 22.1012-4. Where the agency has timely requested a wage determination from DOL for incorporation into an IFB and no collective bargaining

agreement exists, the regulations provide that the wage determination shall not be effective if it is received by the contracting agency less than 10 days before bid opening, and the contracting officer finds that there is not reasonable time to incorporate it in the IFB. 29 C.F.R. § 4.5(a)(2); FAR § 22.1012-2(b).


In this case, IRS properly submitted to DOL an SF 98 on September 20. Having complied with the regulatory requirement to file such requests at least 60 days prior to issuing a solicitation, IRS was unable to delay further issuing its solicitation due to its need to have a contract in place at the beginning of the pending 1991 tax filing season. As a result, the agency issued the solicitation on November 30 and advised bidders that it would incorporate the determinations into the solicitation upon receipt. When the agency still had not received the wage determinations by late December--approximately 3 months after requesting them--the contracting officer contacted DOL to learn the status of the request, as contemplated by 29 C.F.R. § 4.5(d) and FAR § 22.1012-2(a). Although the contracting officer reportedly telephoned DOL prior to bid opening to inquire about DOL's progress in responding to the agency's SF 98, the contracting officer was not advised until the scheduled bid opening date that IRS would have to submit a second request for a wage determination. In view of the need to initiate contract performance at the beginning of the tax filing season, the contracting officer reasonably concluded that it was necessary to proceed with bid opening without waiting for DOL to issue the wage determination. See DJ's Servs., Inc., B-240623, Dec. 5, 1990, 90-2 CPD ¶ 459; Consolidated Mktg. Network, Inc., B-219387, Sept. 3, 1985, 85-2 CPD ¶ 262.

While we recognize that there may be some inequity to bidders in proceeding with bid opening without incorporating the applicable wage determinations in the IFB, the regulations implementing the Service Contract Act authorize the contracting officer to do so where, as here, the wage determinations have not been received from DOL in time to incorporate them into the IFB. See 29 C.F.R. § 4.5(a)(2); FAR § 22.1012-2(b). In fact, given the agency's need for these services to be performed during tax season, IRS had no choice but to proceed. Since the contracting officer complied with the applicable regulations, we see no basis to object to her decision to proceed with bid opening without the wage determinations.

The protester also claims that the awardee is not compensating its employees in accordance with the applicable wage determinations. We will not consider this basis of protest because our Office does not review whether a contractor violates wage determinations during contract performance;

these issues are to be resolved by DOL, the agency responsible  
for enforcement of the Service Contract Act. Donald Clark  
Assocs., Inc., B-238857; B-238857.2, Aug. 2, 1990, 90-2 CPD  
¶ 93.

The protest is denied.

  
for James F. Hinchman  
General Counsel